

Federal Communications Commission

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Three D Radio, Inc.)	File Numbers: EB-04-LA-120
)	EB-04-LA-121
Licensee of Broadcast Stations)	EB-04-LA-122
)	
KQYN(AM)and KKJT(FM))	NAL/Acct. No. 200432900011
Twenty Nine Palms, California)	
)	FRN 0010316594
KDHI(FM))	
Joshua Tree, California)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: September 29, 2004

By the District Director, Los Angeles Office, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Three D Radio, Inc., ("Three D Radio") licensee of stations KQYN(AM) and KKJT(FM) in Twenty Nine Palms, California, and KDHI(FM), Joshua Tree, California,¹ has apparently repeatedly violated Sections 11.35(a) and 11.61 of the Federal Communications Commission's Rules ("Rules") by failing to conduct required monthly Emergency Alert System ("EAS") tests, and failing to ensure that EAS monitoring and transmitting functions were available during the times the stations were in operation.² We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),³ that Three D Radio is apparently liable for a forfeiture in the amount of two thousand dollars (\$2,000).

II. BACKGROUND

2. On May 6, 2004, field agents from the Commission's Los Angeles Office conducted an EAS inspection of collocated stations KQYN(AM), KDHI(FM) and KKJT(FM). The inspection revealed that the stations in question failed to transmit the required monthly EAS tests ("RMTs") over a five month

¹On May 24, 2004, the licenses of KQYN(AM), KDHI(FM) and KKJT(FM) were assigned from Three D Radio, Inc., to Three D Radio, Inc., Debtor-In-Possession. *See* File Nos. BAL-20040513AAX, BALH-20040513AAY, BALH-20040513AAZ. On July 6, 2004, the licenses of KDHI(FM) and KKJT(FM) were assigned from Three D Radio, Inc. Debtor-In-Possession, to Copper Mountain Broadcasting Company. *See* File No. BALH-20040518ACA. The call sign for KKJT(FM) has been changed to KXCM(FM). The call sign for KDHI(FM) has been changed to KQCM(FM). Currently pending is an application to assign the license of KQYN(AM) from Three D Radio, Inc., Debtor-In-Possession, to MCC Radio, LLC. *See* File No. BAL-20040804AFP.

²47 C.F.R. §§11.35(a) and 11.61.

³47 U.C.S. § 503(b).

period. Specifically, no required monthly EAS tests were transmitted during the months of January, February, March, April and May 2004. A review of the stations' logs show that required monthly tests were received in the months of January, April and May of 2004, but not retransmitted in accordance with Section 11.61 of the Rules. There were no EAS log entries to indicate any problem with, or malfunction of, the EAS equipment nor were there any EAS log entries to indicate that the cause of the failure to receive the required tests was investigated. In fact, station management was unaware that the required monthly EAS tests were not consistently being received and retransmitted until the inspection by the field agents. On May 11, 2004, the stations' owner acknowledged to a field agent that the EAS equipment was not programmed to retransmit the required monthly tests. On May 14, 2004, the stations' owner notified the Los Angeles Office that the EAS equipment has been changed to retransmit the required monthly tests as required by the FCC.

III. DISCUSSION

3. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.⁴ The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.⁵ The term "repeated" means the commission or omission of such act more than once or for more than one day.⁶

4. The Rules provide that every AM and FM broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to not participate.⁷ The EAS provides the President and state and local governments with the capability to provide immediate and emergency communications and information to the general public.⁸ State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.⁹ Required monthly and weekly tests originate from EAS Local or State Primary sources and must be retransmitted by the participating station.¹⁰

⁴47 U.S.C. § 503(b).

⁵Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁶Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

⁷47 C.F.R. §§ 11.11 and 11.41.

⁸47 C.F.R. §§ 11.1 and 11.21.

⁹47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

¹⁰See 47 C.F.R. §§ 11.51, 11.61. See also, *Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, EB Docket No. 01-66, *Report and Order*, FCC 02-64 (Feb. 26, 2002); 67 Fed. Reg. 18502 (April 16, 2002).

5. Section 11.35 of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders and attention signal generating and receiving equipment is installed and operational so that the monitoring and transmitting functions are available during the times the station is in operation. Broadcast stations must also determine the cause of any failure to receive required monthly and weekly EAS tests, and must indicate in the station's log why any required tests were not received and when defective equipment is removed and restored to service.¹¹ Section 11.61 of the Rules requires AM and FM stations to (a) receive monthly EAS tests from designated local primary EAS sources and retransmit the monthly test within 60 minutes of its receipt and (b) conduct tests of the EAS header and EOM codes at least once a week at random days and times.¹² The requirement that stations monitor, receive and retransmit the required EAS tests ensures the operational integrity of the EAS system in the event of an actual disaster.

6. A comprehensive review of the stations' logs for the period from January 1, 2004, through May 6, 2004, revealed that Three D Radio was not transmitting required monthly EAS tests in a consistent manner and on a regular basis. There were no log entries in the stations' logs to indicate any problem with, or malfunction of, the EAS equipment nor were there any entries indicating that the cause of the failure to receive and transmit the required tests was investigated. Based on the evidence before us, we find that Three D Radio repeatedly violated Sections 11.35(a) and 11.61 of the Rules by failing to conduct required monthly EAS tests, and by failing to ensure that the monitoring and transmitting functions of EAS equipment was available during the times the stations were in operation.

7. *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines ("Forfeiture Policy Statement")*, and Section 1.80 of the Rules,¹³ sets the base forfeiture amounts for various violations of the Commission's Rules. The *Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the Commission's Rules requiring EAS tests. Therefore we must determine what an appropriate amount should be for this violation.¹⁴ The requirement that stations retransmit the monthly EAS tests is similar in both nature and severity to other required operational readiness checks identified in the Rules as required measurements or required monitoring. Section 1.80(b)(4) of the Rules sets the base forfeiture amount at \$2,000 for failure to make required measurements or conduct required monitoring. Therefore, we assess the base forfeiture for failing to conduct EAS tests in the amount of \$2,000. In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act, which includes the nature, circumstances, extent, and gravity of the violation(s), and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require.¹⁵ Applying the *Forfeiture Policy Statement*, Section 1.80, and the statutory factors to the instant case, a \$2,000 forfeiture is warranted.

¹¹47 C.F.R. § 11.35(a) and (b).

¹²The required monthly and weekly tests are required to conform to the procedures in the EAS Operational Handbook. See also, *Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, EB Docket No. 01-66, *Report and Order*, FCC 02-64 (Feb. 26, 2002); 67 Fed. Reg. 18502 (April 16, 2002) (effective May 16, 2002, the required monthly EAS test must be retransmitted within 60 minutes of receipt.).

¹³12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80.

¹⁴The *Forfeiture Policy Statement* states that "...any omission of a specific rule violation from the...[forfeiture guidelines]...should not signal that the Commission considers any unlisted violation as nonexistent or unimportant." *Forfeiture Policy Statement*, 12 FCC Rcd at 17099. The Commission retains the discretion, moreover, to depart from the *Forfeiture Policy Statement* and issue forfeitures on a case-by-case basis, under its general forfeiture authority contained in Section 503 of the Act. *Id.*

¹⁵47 U.S.C. § 503(b)(2)(D).

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's Rules, Three D Radio, Inc. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of two thousand dollars (\$2,000) for violation of Sections 11.35(a) and 11.61 of the Rules.¹⁶

9. IT IS FURTHER ORDERED that, pursuant to Section 1.80 of the Commission's Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Three D Radio, Inc., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

11. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Western Region, Los Angeles Office, 18000 Studebaker Rd., Suite 660, Cerritos, CA 90703 and must include the NAL/Acct No. referenced in the caption.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁷

14. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the address listed above for the filing of the response. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

¹⁶47 U.S.C. § 503(b); 47 C.F.R. §§ 0111, 0.311, 1.80, 11.35(a) and 11.61.

¹⁷See 47 C.F.R. § 1.1914.

15. IT IS FURTHER ORDERED THAT a copy of this Notice of Apparent Liability for Forfeiture shall be sent by Certified Mail, Return Receipt Requested, and regular mail to Three D Radio, Inc., P.O. Box 908, Twenty Nine Palms, California 92277.

FEDERAL COMMUNICATIONS COMMISSION

Catherine Deaton
District Director
Los Angeles Office
Western Region
Enforcement Bureau

Enclosure: FCC List of Small Entities